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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-452

THE BOEING COMPANY and THOMAS R. WILCOX,

Petitioners,

vs.

WILLIAM R. VAN GEMERT, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents pray that the request by petitioners that a writ of certiorari issue to review the judgment entered on July 14, 1975 by the United States Court of Appeals for the Second Circuit, which judgment reversed and remanded in part and affirmed in part, a judgment of the United States District Court for the Southern District of New York dismissing on the merits a consolidated class action brought both under the Securities Exchange Act of 1934 (the "1934 Act" 15 U.S.C. §78a et seq.) and the Trust Indenture Act of 1939 (the "1939 Act" 15 U.S.C.

§78aaa et seq.) and on principles of pendent jurisdiction on behalf of a class consisting of all unregistered holders of certain convertible debentures of The Boeing Company ("Boeing") who failed to exercise their conversion privilege prior to its expiration on March 29, 1966, be denied.

After trial without jury the District Court concluded that the plaintiff class had failed to establish a cause of action either under the 1934 Act or the 1939 Act and that the notice given to such debenture holders of the redemption of their securities had been in full compliance with the requirements of the indenture under which the debentures had been issued and was reasonable, valid and adequate. The Court of Appeals reversed in part and remanded, finding that the federal law claim was "sufficient for jurisdictional purposes", thus allowing it to assume jurisdiction over the pendent claims based on state law.

The Court of Appeals held that Boeing did not adequately apprise the debenture holders what notice would be given of a redemption call either by the debenture or the prospectus, that the newspaper notice given by Boeing was itself insufficient (20a)* and that this Court does not take the position advanced by the appellees (petitioners herein) that violation of an Exchange rule cannot under any circumstances give rise to civil liability under the federal Acts (16a).

Questions Presented

1. Whether a federal court can entertain pendent jurisdiction over state law claims when the federal law claim is held to be "sufficient for jurisdictional purposes"?

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* Numbers in parentheses refer to pages of petition.

2. Whether compliance by an issuer of convertible debentures with the terms of its indenture as to the notice to be given upon a call of such convertible debentures for redemption, when such terms are not set forth on the debenture itself or the prospectus, is sufficient to give fair and reasonable notice of such redemption to the debenture holders?

Reasons for Denying the Writ

This is not an appropriate case for review on certiorari since none of the considerations governing review on certiorari are present. The Court of Appeals, following this Court's decision in *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966), properly considered state law claims after it found that the federal law claims on which jurisdiction had been premised was "sufficient for jurisdictional purposes" (19a) and therefore were substantial. Furthermore, the state law claims considered did not result in the Court of Appeals rendering an important or novel decision with respect to the relationship between a corporation and its debenture holders or creating new rights for the holders of corporate debentures.

ARGUMENT

POINT I

The Court of Appeals held in effect that the federal law claim presented was a substantial claim.

The Court of Appeals, in the opening and introductory sentence to that section of its opinion entitled "The Federal Law Claim" (14a et seq.) observed that "The claim that Boeing is civilly liable under federal laws * * * is

a colorable one." (14a). Then, after discussing in detail the federal law claim and appellee's contentions, Circuit Judge Oakes concludes with the finding that "The claim for relief is sufficient for jurisdictional purposes in any event". In support of this conclusion, he cites *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 724 (1966) and two Circuit Court decisions (Fn 19, 19a-20a).

Petitioners' application for a Writ of Certiorari is premised upon their statement (12) that "the Court of Appeals decided an important issue of federal jurisdiction in holding that a federal court may entertain exclusively state law claims when it finds that the federal law claims on which jurisdiction has been premised are only 'colorable' and not 'substantial', as required by this Court's decision in *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 725 (1966) * * *." This statement by petitioners is based upon an erroneous reading by them of the Court of Appeals decision. Nowhere does the Court of Appeals decision state that the federal claim is colorable but not substantial. As we have pointed out herein, that decision mentions that the claim is colorable. However, it does not cite *United Mine Workers* v. *Gibbs,* supra, as support for this statement. Significantly, it is only after reviewing the federal law claim that Circuit Judge Oaks states that "the [federal] claim for relief is sufficient for jurisdictional purposes in any event" and specifically refers to the *United Mine Workers* v. *Gibbs,* case, supra, as authority therefor.

The *United Mine Workers* v. *Gibbs* decision, supra, is so patently clear for the proposition that the federal issue must be substantial that there could be no purpose in Circuit Judge Oakes' citing it as authority for his statement that the federal "claim for relief is sufficient for jurisdictional purposes in any event." unless he intended that this "claim for relief" was "substantial". In this con-

nection, it must be noted that Judge Oakes did not repeat the word "colorable", but added the concluding phrase "in any event". Petitioners' focusing on the preliminary use of the word "colorable" and then making their own conclusions thereon, is at variance not only with the tenor and meaning of the Circuit Court decision, but with the very words of the decision as well which clearly treats the federal issue as substantial.

This Court in defining what is insubstantial held that the federal cause of action must be "wholly insubstantial", "obviously frivolous" or "obviously without merit". *Hagens* v. *Lavine,* 415 U.S. 528, 537. These characteristics are not descriptive of the federal cause of action in the case at bar.

The determination of whether a federal claim is "substantial" is on the basis of the pleadings and not upon evidence ultimately produced at trial. Thus if a cause of action can withstand a motion to dismiss for failure to state a claim, it would be deemed "substantial" for jurisdictional purposes. *A. H. Emery Co.* v. *Marcan Products Corp.* (DCNY) 268 F.Supp. 289, aff'd (C.A. 2) 389 F.2d 11, cert. den. 393 U.S. 835 (1968); *Edward J. Moriarty & Co.* v. *General Tire & Rubber Co.* (DC, Ohio) 289 F. Supp. 381.

The Second Circuit has gone even further by stating in *Kavit* v. *A. L. Stamm & Co.* (C.A. 2), 491 F.2d 1176 (1974) at page 1180

> "• • • If it appears that the federal claims are subject to dismissal under F. R. Civ. P. 12(b)(6) or could be disposed of on a motion for summary judgment under F. R. Civ. P. 56, the court should refrain from exercising pendent jurisdiction absent exceptional circumstances.[4]"
>
> "Fn. 4 Such circumstances might be found when the defendant fails to call the court's attention to

> the weakness of the federal claim before the court has invested a substantial amount of time in the case, see, e.g., A. H. Emery Co. v. Marcan Products Corp. [supra]".

No motions were made by the petitioners in the case at bar to dismiss under FRCP 12 or for summary judgment under FRCP 56. Moreover this case was pending more than seven years prior to its reaching the Court of Appeals.

POINT II

The Court of Appeals properly exercised its discretion in considering state law claims pursuant to pendent jurisdiction and did not create rights to notice under New York law which had not previously existed.

Point II of petitioners' argument is based on the premise, which petitioners accept solely for the purpose of that Point, that the matters in the suit at bar were properly before the federal court (opening Paragraph, 16). They then state (8) that "the purely state law claim * * * as to the adequacy of the notice * * * was the very heart of the case * * * and this claim could have been maintained separately in a state court.", and conclude by stating that the Court of Appeals has failed to avoid a needless decision of state law, citing as authority the statement from the *United Mine Workers* v. *Gibbs* decision that if state issues substantially dominate, they may be dismissed without prejudice.

Petitioners exercise in logic fails, however, when the decision of the Court of Appeals below is read with it. That section of the Court of Appeals decision dealing

with the federal law claim (14a through 19a) indicates very clearly that what petitioners seek to characterize as a "purely state law claim" is in fact a claim which probably violated federal law as well. Since petitioners have accepted, for the purposes of their argument in Point II, that plaintiffs' claim under federal law is a substantial one, it is totally illogical for them to conclude their argument by claiming that the matters at suit are purely state law claims.

Petitioners then argue that by its decision the Court of Appeals has created a new right under New York State law which the New York Court of Appeals has not created (16) and has needlessly decided an issue of state law.

The mere fact that the New York Court of Appeals has not decided an issue does not mean that the law is unresolved. Lower court decisions are binding and expositive of law as well as appellate decisions. In this instance, the question is that of notice. There is no question that notice is required, since this is set forth in the contract between the parties. The question is, what notice. This depends on the facts of each case. The six cases cited by petitioners (17) as examples of their claim that "The Court of Appeals decision here is at substantial odds with all prior court decisions on this isuse and with the law of New York State, * * *" are all clearly distinguishable from the case at bar. Indeed, two of these cases, *Abramson* v. *Burroughs Corp.* [1971-1972 Transfer Binder] CCH Fed. Sec. L.Rep. ¶93,456 (SDNY 1972) and *Kaplan* v. *Vornado, Inc.*, 341 F.Supp. 212 (N.D.Ill. 1971) are discussed and distinguished by Circuit Judge Oakes in his decision below (22a-24a). Of the other four cases, *Kurtz* v. *American Export Industries, Inc.*, 370 N.Y.S.2d 599 (1st Dept. 1975) is distinguishable on the same grounds as *Abramson* v. *Burroughs Corp.*, supra,—that the face of the debenture in question in those cases clearly and specifically indicated the facts required for

adequate notice to be found; *Gampel* v. *Burlington Industries, Inc.*, 43 Misc.2d 846 (Sup.Ct. N.Y. County 1964) is distinguishable because the only basis for summary judgment for defendant was that plaintiff's sole claim for relief was based on his argument that the Wall Street Journal was not a paper of general circulation, and the Court found and held that this paper was a paper of general circulation; *Kraus* v. *Laclede Gas Co.*, 354 S.W. 2d 327 (St. Louis Ct.App. 1962) is distinguishable because the debentures there in question contained on their face the information as to what, when and where notice of redemption would be given, whereas in the case at bar debentures merely referred to the indenture for information as to what, when and where notice of redemption would be given; *Mueller* v. *Howard Aircraft Corporation*, 329 Ill. App. 570, 70 N.E.2d 203 (1946) is distinguishable, inter alia, because the question of notice was not the issue raised (though it might be noted that even here the debenture in question contained on its face information concerning what, when and where notice of redemption would be given), but rather whether as a condition precedent to the debentures valid redemption monies sufficient to pay the redemption should have been deposited with the designated paying agent prior to the call date.

Furthermore, contrary to petitioners assertion (Point II, 16-19), the New York Court of Appeals has passed upon the legal principle on which the Second Circuit decision below is based. In *Cunningham* v. *Pressed Steel Car Company*, 263 N.Y. 671, 672, 189 N.E. 750 (1934) in a Per Curiam decision, the New York Court of Appeals held that "* * * reference to the trust indenture did not fairly place the bondholder on notice of any restriction * * *" preventing him from instituting suit, and affirmed an Appellate Division decision reversing Special Term and granting summary judgment for plaintiff. So too, in *Friedman* v. *Airlift International, Inc.*, 44 A.D.2d 459,

460 (N.Y. Supreme Court, Appellate Division, First Department, 1974) the Court said: "Restrictions against suit in an indenture are not effective unless the face of the bond gives adequate notice of the restriction."

It thus appears that the Court of Appeals decision below is not at odds with all prior court decisions and the law of New York State, but is merely that court's determination of the law as it applies to the facts of the case at bar.

The question of proper notice is the core of the federal question as well as the state question. The fact that the Court of Appeals reversed the lower court on the basis of its determination of the state question, without reaching any decision on the federal question, does not render the state issue "substantially predominate" so as to make it an abuse of discretion for the federal court to exercise pendent jurisdiction thereof. *Greene* v. *Louisville & I.R.C.*, 244 U.S. 499, 508, 37 S.Ct. 673.

CONCLUSION

For the reasons set forth above, respondents pray that the petitioners' application that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit, be denied.

Dated: October 17, 1975.

Respectfully submitted,

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